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4 **UNITED STATES DISTRICT COURT**

5 **EASTERN DISTRICT OF WASHINGTON**

6 **ESMERALDA GONZALEZ,**

7 **Plaintiff,**

8 **vs.**

9 **COMMISSIONER OF SOCIAL**

10 **SECURITY,**

11 **Defendant.**

No. 1:16-cv-03157-MKD

**ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

ECF Nos. 16, 17

12 **BEFORE THE COURT** are the parties' cross-motions for summary
13 judgment. ECF Nos. 16, 17. The parties consented to proceed before a magistrate
14 judge. ECF No. 4. The Court, having reviewed the administrative record and the
15 parties' briefing, is fully informed. For the reasons discussed below, the Court
16 denies Plaintiff's motion (ECF No. 16) and grants Defendant's motion (ECF No.
17 17).

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The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g); 1383(c)(3).

STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted). In determining whether the standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one rational interpretation, [the court] must uphold the ALJ’s findings if they are supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674

1 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an
2 ALJ’s decision on account of an error that is harmless.” *Id.* An error is harmless
3 “where it is inconsequential to the [ALJ’s] ultimate nondisability determination.”
4 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s
5 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
6 *Sanders*, 556 U.S. 396, 409-10 (2009).

7 **FIVE-STEP EVALUATION PROCESS**

8 A claimant must satisfy two conditions to be considered “disabled” within
9 the meaning of the Social Security Act. First, the claimant must be “unable to
10 engage in any substantial gainful activity by reason of any medically determinable
11 physical or mental impairment which can be expected to result in death or which
12 has lasted or can be expected to last for a continuous period of not less than twelve
13 months.” 42 U.S.C. §§ 423(d)(1)(A); 1382c(a)(3)(A). Second, the claimant’s
14 impairment must be “of such severity that he is not only unable to do his previous
15 work[,] but cannot, considering his age, education, and work experience, engage in
16 any other kind of substantial gainful work which exists in the national economy.”
17 42 U.S.C. §§ 423(d)(2)(A); 1382c(a)(3)(B).

18 The Commissioner has established a five-step sequential analysis to
19 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
20 404.1520(a)(4)(i)-(v); 416.920(a)(4)(i)-(v). At step one, the Commissioner

1 considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);
2 416.920(a)(4)(i). If the claimant is engaged in "substantial gainful activity," the
3 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
4 404.1520(b); 416.920(b).

5 If the claimant is not engaged in substantial gainful activity, the analysis
6 proceeds to step two. At this step, the Commissioner considers the severity of the
7 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the
8 claimant suffers from "any impairment or combination of impairments which
9 significantly limits [his or her] physical or mental ability to do basic work
10 activities," the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c);
11 416.920(c). If the claimant's impairment does not satisfy this severity threshold,
12 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.
13 §§ 404.1520(c); 416.920(c).

14 At step three, the Commissioner compares the claimant's impairment to
15 severe impairments recognized by the Commissioner to be so severe as to preclude
16 a person from engaging in substantial gainful activity. 20 C.F.R. §§
17 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more
18 severe than one of the enumerated impairments, the Commissioner must find the
19 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

1 If the severity of the claimant's impairment does not meet or exceed the
2 severity of the enumerated impairments, the Commissioner must pause to assess
3 the claimant's "residual functional capacity." Residual functional capacity (RFC),
4 defined generally as the claimant's ability to perform physical and mental work
5 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§
6 404.1545(a)(1); 416.945(a)(1), is relevant to both the fourth and fifth steps of the
7 analysis.

8 At step four, the Commissioner considers whether, in view of the claimant's
9 RFC, the claimant is capable of performing work that he or she has performed in
10 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv); 416.920(a)(4)(iv).
11 If the claimant is capable of performing past relevant work, the Commissioner
12 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f); 416.920(f).
13 If the claimant is incapable of performing such work, the analysis proceeds to step
14 five.

15 At step five, the Commissioner considers whether, in view of the claimant's
16 RFC, the claimant is capable of performing other work in the national economy.
17 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination,
18 the Commissioner must also consider vocational factors such as the claimant's age,
19 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v);
20 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the

Commissioner must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to other work, analysis concludes with a finding that the claimant is disabled and is therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1); 416.920(g)(1).

The claimant bears the burden of proof at steps one through four above. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to step five, the burden shifts to the Commissioner to establish that (1) the claimant is capable of performing other work; and (2) such work “exists in significant numbers in the national economy.” 20 C.F.R. §§ 404.1560(c)(2); 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

ALJ’s FINDINGS

Plaintiff protectively applied for Title XVI supplemental security income benefits and for Title II disability insurance benefits on June 27, 2012, alleging an onset disability date of April 1, 2011. Tr. 196-211. The applications were denied initially, Tr. 115-32, and on reconsideration, Tr. 133-43. Plaintiff appeared at a hearing before an administrative law judge (ALJ) on July 10, 2014. Tr. 33-60. On March 27, 2015, the ALJ denied Plaintiff’s claim. Tr. 15-32.

At the outset, the ALJ determined that the date last insured is September 30, 2014. Tr. 20. At step one of the sequential evaluation analysis, the ALJ found Plaintiff has not engaged in substantial gainful activity since April 1, 2011, the

1 alleged onset date. Tr. 20. At step two, the ALJ found Plaintiff has the following
2 severe impairments: migraine headaches and affective disorder. Tr. 21. At step
3 three, the ALJ found Plaintiff does not have an impairment or combination of
4 impairments that meets or medically equals the severity of a listed impairment. Tr.
5 22. The ALJ then concluded that Plaintiff has the following RFC:

6 to perform medium work as defined in 20 CFR 404.1567(c) and
7 416.967(c) except she can lift up to 50 pounds occasionally; she can
8 lift and or carry 25 pounds frequently; she can stand and or walk for
9 approximately 6 hours and sit for approximately 6 hours per 8 hour
workday with normal breaks; she is limited to simple, repetitive tasks;
and she is limited to superficial interaction with coworkers and only
occasional and superficial interaction with the public.

10 Tr. 23.

11 At step four, the ALJ found Plaintiff is unable to perform her past relevant
12 work. Tr. 26. At step five, after considering the testimony of a vocational expert,
13 the ALJ found there are jobs that exist in significant numbers in the national
14 economy that Plaintiff can perform, such as hand packager, laundry worker, and
15 industrial cleaner. Tr. 27. Thus, the ALJ concluded Plaintiff has not been under a
16 disability since April 1, 2011, the alleged onset date through the date of the
17 decision. Tr. 27-28.

18 On August 16, 2016, the Appeals Council denied review of the ALJ's
19 decision, Tr. 1-6, making the ALJ's decision the Commissioner's final decision for
20 purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

ISSUES

Plaintiff seeks judicial review of the Commissioner's final decision denying her supplemental security income benefits under Title XVI and disability insurance benefits under Title II of the Social Security Act. Plaintiff raises the following issues for review:

1. Whether the ALJ properly weighed the medical opinion evidence;
2. Whether the ALJ properly discredited Plaintiff's symptom claims; and
3. Whether the ALJ properly determined the severe impairments at step two.

ECF No. 16 at 6.

DISCUSSION

A. Medical Opinion Evidence

Plaintiff contends the ALJ gave too little weight to the opinion of Nina Rapisarda, MSW, and gave too much weight to the opinions of Drew Stevick, M.D., and Gary Nelson, Ph.D. ECF No. 16 at 7-13.

There are three types of physicians: "(1) those who treat the claimant (treating physicians); (2) those who examine but do not treat the claimant (examining physicians); and (3) those who neither examine nor treat the claimant but who review the claimant's file (nonexamining or reviewing physicians)." *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (brackets omitted).

1 “Generally, a treating physician’s opinion carries more weight than an examining
2 physician’s, and an examining physician’s opinion carries more weight than a
3 reviewing physician’s.” *Id.* “In addition, the regulations give more weight to
4 opinions that are explained than to those that are not, and to the opinions of
5 specialists concerning matters relating to their specialty over that of
6 nonspecialists.” *Id.* (citations omitted).

7 If a treating or examining physician’s opinion is uncontradicted, an ALJ may
8 reject it only by offering “clear and convincing reasons that are supported by
9 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

10 “However, the ALJ need not accept the opinion of any physician, including a
11 treating physician, if that opinion is brief, conclusory and inadequately supported
12 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
13 (9th Cir. 2009) (citing *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002))
14 (internal quotation marks and brackets omitted). “If a treating or examining
15 doctor’s opinion is contradicted by another doctor’s opinion, an ALJ may only
16 reject it by providing specific and legitimate reasons that are supported by
17 substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester v. Chater*, 81 F.3d
18 821, 830-31 (9th Cir. 1995)).

19 The opinion of an acceptable medical source, such as a physician or
20 psychologist, is given more weight than that of an “other source.” 20 C.F.R. §§

1 404.1527, 416.927; *Gomez v. Chater*, 74 F.3d 967, 970-71 (9th Cir. 1996). “Other
2 sources” include nurse practitioners, physicians’ assistants, therapists, teachers,
3 social workers, spouses and other non-medical sources. 20 C.F.R. §§ 404.1513(d),
4 416.913(d). However, the ALJ is required to “consider observations by non-
5 medical sources as to how an impairment affects a claimant’s ability to work.”
6 *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987). Non-medical testimony
7 can never establish a diagnosis or disability absent corroborating competent
8 medical evidence. *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996).
9 Pursuant to *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993), an ALJ is
10 obligated to give reasons germane to “other source” testimony before discounting
11 it.

12 *1. Ms. Rapisarda*

13 In February 2007, Ms. Rapisarda evaluated Plaintiff and opined that Plaintiff
14 could work approximately 11-20 hours a week due to depression and PTSD. Tr.
15 486-87. The ALJ noted that she considered the opinion, but gave it “little weight.”
16 Tr. 26. As a social worker, Ms. Rapisarda is an “other source” under the
17 regulations. 20 C.F.R. §§ 404.1513(d), 416.913(d) (2013).¹ Thus, the ALJ was
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20 ¹ This regulation was amended on March 27, 2017.

1 required to cite germane reasons for rejecting the opinion. *See Dodrill*, 12 F.3d at
2 919.

3 First, the ALJ rejected Ms. Rapisarda's opinion because it was rendered in
4 February 2007, more than four years prior to the alleged disability onset date of
5 April 2011. Tr. 26. Given the gap of more than four-years, this is not an instance
6 where the opinion was rendered close in time to the alleged onset date. Under
7 these circumstances, the pre-onset timing of Ms. Rapisarda's opinion is a germane
8 reason to discount it. *See Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d
9 1155, 1165 (9th Cir. 2008) ("Medical opinions that predate the alleged onset of
10 disability are of limited relevance.").

11 Second, the ALJ rejected the opinion because the assessed limitations were
12 limited to a ten-month period. Tr. 26. Here, the ALJ correctly noted that Ms.
13 Rapisarda opined that Plaintiff's condition would limit her ability to work, look for
14 work, or train for work for ten months. Tr. 487. Ms. Rapisarda indicated that
15 Plaintiff would benefit from medication management services and therapy. Tr.
16 487. To be found disabled, a claimant must be unable to engage in any substantial
17 gainful activity due to an impairment which "can be expected to result in death or
18 which has lasted or can be expected to last for a continuous period of not less than
19 12 months." 42 U.S.C. § 423(d)(1)(A); *see also Chaudhry v. Astrue*, 688 F.3d 661,
20 672 (9th Cir. 2012). Here, because Ms. Rapisarda opined limitations lasting for ten

1 months, the duration requirement for a finding of disability is not met. Moreover,
2 the Court further notes that the limitations would have expired three and a half
3 years prior to the alleged onset date. This is another germane reason to discount
4 the opinion.

5 Plaintiff contends that the ALJ should have concluded that Ms. Rapisarda's
6 assessed limitations were relevant from the date rendered, February 2007,
7 throughout the disability period, ending in March 2015, because Plaintiff
8 "continued to suffer severe psychiatric impairments for years forward." ECF No.
9 16 at 9-10. Plaintiff has cited no authority nor has the Court located authority to
10 support extending limitations assessed for a ten-month period to over an eight-year
11 period. As noted by Defendant, in the interim, Plaintiff obtained employment and
12 worked for a period, engaged in substantial daily activities, and her medical record
13 does not support the alleged limitations, discussed *infra*. It would be inappropriate
14 under these circumstances to extend the limited-duration restrictions to the relevant
15 disability period. Moreover, given the subsequent medical record in this case, the
16 2007 opinion did not create an inconsistency or ambiguity in the evidence
17 requiring the ALJ to further develop the record.

18 2. *Dr. Stevick*

19 In January 2013, Dr. Stevick, a state agency psychological consultant
20 reviewed Plaintiff's record and opined that Plaintiff could lift 50 pounds

1 occasionally and 25 pounds frequently; stand and/or walk with normal breaks 6
2 hours in an 8-hour work day; and sit with normal breaks 6 hours in an 8-hour
3 workday. Tr. 92-94, 105-06. The ALJ gave this opinion “significant weight.” Tr.
4 26. The ALJ noted that Dr. Stevick reviewed the record; his opinion is consistent
5 with the record; the record indicated intermittent problems with headaches;
6 Plaintiff’s headaches appeared mostly controlled by medication; and Plaintiff
7 continued to function even without medication for headaches during the course of
8 her pregnancies. Tr. 26.

9 Plaintiff contends the ALJ erred in giving significant weight to this opinion.
10 ECF No. 16 at 10-11. First, Plaintiff contends that the ALJ erred by referring to
11 her headaches as “intermittent,” instead, contending she experienced them
12 regularly, up to three times per week. ECF No. 16 at 10. In support of her
13 argument, she cites a treatment record from January 2010, where she told a
14 treatment provider that she was down to two headache days per week (eight days
15 per month) from 30 days per month, which the provider interpreted as a 75%
16 improvement, Tr. 299; and an April 2010 office visit record where she was seen
17 for a headache that lasted three days, Tr. 323. These records do not demonstrate
18 that the ALJ’s conclusion was unsupported. Moreover, the Court notes that
19 Plaintiff’s medical provider referred to her migraines as “intermittent.” *See* Tr.
20 329 (February 2010 treatment note stating “patient has a two-year history of

1 intermittent migraine headaches. The patient states that she gets approximately 3
2 per week.”).² In addition, in April 2014, Plaintiff sought treatment for a migraine.
3 At the time, she told the treatment provider, it is the kind of headache she gets in
4 the spring and summer, Tr. 458, which is evidence consistent with the ALJ’s
5 characterization of the occurrence as “intermittent.” Given that the ALJ referred to
6 the frequency of Plaintiff’s headache in the same manner as one of Plaintiff’s
7 treating physicians and in a manner consistent with a substantial portion of the
8 treatment records, the Court finds no error.

9 Next, Plaintiff contends that the record does not support the ALJ’s
10 conclusion that her headaches were “mostly controlled” by medication. ECF No.
11 16 at 10. In support of the ALJ’s conclusion, she cited the January 2010 treatment
12 note indicating when Plaintiff made lifestyle changes and took medication, her
13 headaches improved by 75%. Tr. 22 (citing Tr. 299). This was a reasonable
14 interpretation of the evidence by the ALJ. Finally, Plaintiff challenge the ALJ’s
15 conclusion that she was able to function when not taking her medication. ECF No.
16 16 at 11. As discussed *infra*, the ALJ identified the numerous daily activities that
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18 ² Subsequent to 2010, Plaintiff’s medical records routinely describe her migraine
19 history as “migraine, common, not intractable.” *See, e.g.*, Tr. 368, 372, 375, 379,
20 430, 437, 444, 458-59, 462, 477.

1 Plaintiff was able to engage in while pregnant and not taking medication,³ which
2 undermined her symptom complaints, Tr. 25. Moreover, in 2014 while pregnant
3 and not taking medication, Plaintiff only sought treatment for headaches on two
4 occasions. Tr. 430-36; 458-61. This was a reasonable interpretation of the
5 evidence. Since the evidence is susceptible to more than one rational
6 interpretation, the ALJ's conclusion must be upheld. *See Burch v. Barnhart*, 400
7 F.3d 676, 679 (9th Cir. 2005). Here, the ALJ set forth specific, legitimate reasons
8 for crediting Dr. Stevick's opinion. Significantly, Plaintiff has not identified any
9 provider who assessed any more restrictive limitations related to her headaches.

10 *3. Dr. Nelson*

11 In November 2012, non-examining state agency psychological consultant
12 Dr. Nelson opined that Plaintiff was capable of simple routine tasks and some
13 complex tasks on a consistent basis while maintaining adequate concentration,
14 persistence, and pace, and was able to interact with the general public and
15 coworkers on an occasional superficial basis and with supervisors on a more
16 frequent basis. Tr. 69-71. The ALJ gave "great weight" to this opinion. Tr. 26.
17 The ALJ noted that Dr. Nelson reviewed the record; his opinion is consistent with

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19 ³ At the hearing, Plaintiff testified that she was not taking her migraine medication
20 while she was pregnant. Tr. 53.

1 the record; mental status exam findings indicate no unusual anxiety or evidence of
2 depression; and Plaintiff had not consistently engaged in mental health treatment,
3 which indicated her mental health symptoms were not as severe as alleged. Tr. 26.

4 First, Plaintiff contends the ALJ misstated the record in finding that the
5 mental status exams did not show any unusual anxiety or depression. ECF No. 16
6 at 12. In support, Plaintiff cites two treatment records. *Id.* On January 26, 2010,
7 Plaintiff presented at her doctor's office in crisis, three days after her abusive
8 boyfriend hit her and threw her against a wall in front of her children; she was
9 crying and upset. Tr. 331. Plaintiff's response to this situational event⁴ that
10 occurred 15 months prior to her alleged onset date does not undermine the ALJ's
11 assessment of the medical evidence. Plaintiff next cites a mental health record
12 from November 2012, where Plaintiff was tearful during her session. ECF No. 16
13 at 12 (citing Tr. 394). These two records do not undermine the ALJ's weighing of
14 the evidence. Here, there is substantial evidence in the record to support the ALJ's
15 conclusion that Plaintiff's exams resulted in normal findings. *See, e.g.*, Tr. 382
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19 ⁴ The ALJ previously noted that the record demonstrated that Plaintiff was engaged
20 in an abusive relationship in early 2010. Tr. 21.

1 (Sept. 2011 office visit: neurological exam normal and “psychiatric: alert and
2 oriented. No unusual anxiety for evidence of depression”).⁵

3 Next, Plaintiff contends the ALJ erred in giving Dr. Nelson’s opinion more
4 weight because Plaintiff did not consistently seek mental health treatment. ECF
5 No. 16 at 12. In support, Plaintiff contends that this is an inaccurate representation
6 of the record and cites to mental health treatment records, showing four
7 appointments, in January 2010 (Tr. 332), in May 2010 (Tr. 318), in November
8 2012 (Tr. 394), and in January 2013 (Tr. 392). The Court notes that in the five
9 year period for which records were provided (2010-2014), Plaintiff sought
10 treatment on only four occasions. Only two of those appointments occurred in the

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12 ⁵ See also Tr. 424 (July 2014 treatment note: appropriate interaction, negative for
13 headache/psychiatric symptoms, alert and oriented, no unusual anxiety or evidence
14 of depression); Tr. 460 (April 2014 treatment note: no unusual anxiety or evidence
15 of depression); Tr. 475 (Dec. 2013 treatment note: psychiatric-patient is oriented to
16 time, place, person, and situation); Tr. 477 (Nov. 2012 treatment note: negative for
17 psychiatric symptoms, no unusual anxiety or evidence of depression); Tr. 376-77
18 (Nov. 2011 treatment note: appropriate interaction, negative for headache/
19 psychiatric symptoms); Tr. 379-82 (Sept. 2011 treatment note: alert and oriented,
20 no unusual anxiety or evidence of depression).

1 relevant period. Here, Plaintiff alleged disabling anxiety. As discussed *infra*, the
2 ALJ reasonably concluded that Plaintiff's credibility was undermined by her
3 minimal mental health treatment.

4 Significantly, Plaintiff has not identified any medical source statement given
5 during the relevant period who assessed any greater functional limitations than
6 assessed by the reviewing physicians, whose opinions she challenges. The ALJ
7 properly weighed the medical evidence.

8 **B. Adverse Credibility Finding**

9 Plaintiff faults the ALJ for failing to rely on reasons that were clear and
10 convincing in discrediting her symptom claims. ECF No. 16 at 13-17.

11 An ALJ engages in a two-step analysis to determine whether a claimant's
12 testimony regarding subjective pain or symptoms is credible. *Molina*, 674 F.3d at
13 1112. "First, the ALJ must determine whether there is objective medical evidence
14 of an underlying impairment which could reasonably be expected to produce the
15 pain or other symptoms alleged." *Id.* (internal quotation marks omitted). "The
16 claimant is not required to show that her impairment could reasonably be expected
17 to cause the severity of the symptom she has alleged; she need only show that it
18 could reasonably have caused some degree of the symptom." *Vasquez v. Astrue*,
19 572 F.3d 586, 591 (9th Cir. 2009) (internal quotation marks omitted).

1 Second, “[i]f the claimant meets the first test and there is no evidence of
2 malingering, the ALJ can only reject the claimant’s testimony about the severity of
3 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
4 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal
5 citations and quotations omitted). “General findings are insufficient; rather, the
6 ALJ must identify what testimony is not credible and what evidence undermines
7 the claimant’s complaints.” *Id.* (quoting *Lester*, 81 F.3d at 834 (9th Cir. 1995));
8 *Thomas*, 278 F.3d at 958 (9th Cir. 2002) (“[T]he ALJ must make a credibility
9 determination with findings sufficiently specific to permit the court to conclude
10 that the ALJ did not arbitrarily discredit claimant’s testimony.”). “The clear and
11 convincing [evidence] standard is the most demanding required in Social Security
12 cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v.*
13 *Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

14 In making an adverse credibility determination, the ALJ may consider, *inter*
15 *alia*, (1) the claimant’s reputation for truthfulness; (2) inconsistencies in the
16 claimant’s testimony or between her testimony and her conduct; (3) the claimant’s
17 daily living activities; (4) the claimant’s work record; and (5) testimony from
18 physicians or third parties concerning the nature, severity, and effect of the
19 claimant’s condition. *Thomas*, 278 F.3d at 958-59.

1 This Court finds the ALJ provided specific, clear, and convincing reasons
2 for finding that Plaintiff's statements concerning the intensity, persistence, and
3 limiting effects of her symptoms "are not entirely credible." Tr. 24.

4 *1. Unemployment Benefits*

5 First, the ALJ gave less weight to Plaintiff's testimony because she collected
6 unemployment benefits in 2011 and 2012, during the time she alleges disability.
7 Tr. 24-25. While the receipt of unemployment benefits can undermine a
8 claimant's alleged inability to work fulltime, the record here does not establish
9 whether Plaintiff held herself out as available for full-time or part-time work.

10 According to the Ninth Circuit, only the former is inconsistent with her disability
11 allegations. *See Carmickle*, 533 F.3d at 1162-63. This is not a clear and
12 convincing reason to discredit Plaintiff's symptom claims. However, any error is
13 harmless because, as discussed *infra*, the ALJ gave additional reasons, supported
14 by substantial evidence, for discrediting Plaintiff's symptom complaints. *See id.* at
15 1162-63; *Molina*, 674 F.3d at 1115 ("[S]everal of our cases have held that an
16 ALJ's error was harmless where the ALJ provided one or more invalid reasons for
17 disbelieving a claimant's testimony, but also provided valid reasons that were
18 supported by the record."); *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190,
19 1197 (9th Cir. 2004) (holding that any error the ALJ committed in asserting one
20

1 impermissible reason for claimant's lack of credibility did not negate the validity
2 of the ALJ's ultimate conclusion that the claimant's testimony was not credible).

3 2. *Improvement with Treatment*

4 The ALJ found that Plaintiff's claims lacked credibility because Plaintiff
5 improved with treatment and lifestyle changes. Tr. 25. An ALJ may rely on
6 examples of "broader development" of improvement when finding a claimant's
7 testimony not credible. *Garrison*, 759 F.3d at 1017-18. Moreover, the
8 effectiveness of medication and treatment is a relevant factor in determining the
9 severity of a claimant's symptoms, 20 C.F.R. §§ 404.1529(c)(3), 416.929(c)(3);
10 *see Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006)
11 (Conditions effectively controlled with medication are not disabling for purposes
12 of determining eligibility for benefits) (internal citations omitted); *see also*
13 *Tommasetti v. Astrue*, 533 F.3d 1035, 1040 (9th Cir. 2008) (a favorable response to
14 treatment can undermine a claimant's complaints of debilitating pain or other
15 severe limitations). Specifically, the ALJ noted that the "medical records indicate
16 a 75 percent improvement in headaches after [Plaintiff] made lifestyle changes,
17 including daily exercise, weight loss, leaving an abusive boyfriend, and going back
18 to school." Tr. 25 (citing Tr. 299) (noting Plaintiff is "back to occasional
19 migraines"). In January 2010, Plaintiff reported to her provider that her headaches
20 had decreased down from daily to twice a week, which the provider estimated to be

1 a “75% improvement” and which the provider attributed to medication and
2 lifestyle changes. Tr. 299. Plaintiff contends she reported her headaches worsened
3 for a period after a domestic violence assault. ECF No. 16 at 5. As discussed
4 *infra*, however, Plaintiff’s complaints of headaches were intermittent during the
5 relevant period. Although the evidence of improvement with medication in this
6 case may be interpreted more favorably to the Plaintiff, such evidence is
7 susceptible to more than one rational interpretation, and therefore the ALJ’s
8 conclusion must be upheld. *See Burch*, 400 F.3d at 679. The ALJ’s interpretation
9 of the evidence was reasonable. This was a clear and convincing reason to
10 discredit Plaintiff’s symptom claims.

11 3. Medical Record

12 The ALJ found the objective evidence does not support the degree of
13 symptoms alleged. Tr. 25. An ALJ may not discredit a claimant’s pain testimony
14 and deny benefits solely because the degree of pain alleged is not supported by
15 objective medical evidence. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir.
16 2001); *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991); *Fair*, 885 F.2d at
17 601. However, the medical evidence is a relevant factor in determining the
18 severity of a claimant’s pain and its disabling effects. *Rollins*, 261 F.3d at 857; 20

1 C.F.R. § 416.929(c)(2); *see also* S.S.R. 96-7p.⁶ Minimal objective evidence is a
2 factor which may be relied upon in discrediting a claimant's testimony, although it
3 may not be the only factor. *See Burch*, 400 F.3d at 680.

4 First, the ALJ noted "[i]n addition to intermittent headache complaints,
5 [Plaintiff's medical records] primarily relate to routine care such as prenatal care."
6 Tr. 25. The record supports the ALJ's conclusion. Here, Plaintiff routinely sought
7 medical care during the relevant period and only occasionally noted complaints
8 regarding headaches. In 2010, prior to the alleged onset date, Plaintiff's medical
9 records indicate she sought medical treatment on numerous occasions, but
10 specifically noted complaints of headaches on only four occasions.⁷ Significantly,

11 _____
12 ⁶ S.S.R. 96-7p was superseded by S.S.R. 16-3p effective March 16, 2016. The new
13 ruling also provides that the consistency of a claimant's statements with objective
14 medical evidence and other evidence is a factor in evaluating a claimant's
15 symptoms. S.S.R. 16-3p at *6. Nonetheless, S.S.R. 16-3p was not effective at the
16 time of the ALJ's decision and therefore does not apply in this case.

17 ⁷ *See* Tr. 319 (May 4, 2010, reporting that she has headaches two to three times a
18 week that last several hours); Tr. 323 (April 8, 2010 office visit for headache
19 lasting three days); Tr. 329 (Feb. 1, 2010 office visit for migraine); Tr. 312 (Aug.
20 10, 2010 ER visit after domestic violence assault). Plaintiff sought medical

1 from 2011 to 2013, Plaintiff sought medical treatment related to headaches on one
2 occasion⁸ despite seeking treatment for numerous other ailments.⁹ Significantly, at
3 the July 10, 2014 hearing, Plaintiff testified since she was assaulted by her
4 boyfriend in 2010, she now has “constant migraines and seizures.” Tr. 47. At the
5 time of the hearing, Plaintiff was pregnant. Tr. 38. From December 2013 to July
6 2014, Plaintiff sought prenatal care on eleven occasions and complained of
7 problems with headaches during only two of those visits;¹⁰ she never complained

9 treatment numerous times and did not mention complaints of headaches. *See, e.g.*,
10 Tr. 314 (Aug. 2, 2010 gynecological care); Tr. 316 (July 15, 2010 follow up for on
11 the job wrist injury); Tr. 318 (May 4, 2010 depression management); Tr. 321
12 (April 22, 2010 gynecological care); Tr. 325 (Feb. 25, 2010 sore throat); Tr. 327
13 (Feb. 17, 2010 gynecological care); Tr. 331 (Jan. 26, 2010 depression after
14 domestic violence); Tr. 334 (Jan. 25, 2010 gynecological care).

15 ⁸ Tr. 379 (Sept. 7, 2011 office visit for headaches)

16 ⁹ *See, e.g.*, Tr. 477 (Nov. 28 2012 cold); Tr. 368 (April 10, 2012 gynecological
17 care); Tr. 481 (Nov. 16, 2012 bronchitis); Tr. 372 (Jan. 25, 2012 UTI/ear pain); Tr.
18 375 (Nov. 16, 2011 gynecological care); Tr. 386 (mental health treatment).

19 ¹⁰ *See* Tr. 430-36 (June 11, 2014 prenatal visit; reported migraine for three days);
20 Tr. 458-61 (April 24, 2014 prenatal visit; reported migraine for one day)

1 of experiencing seizures during her pregnancy.¹¹ The medical treatment a Plaintiff
2 seeks to relieve her symptoms is a relevant factor in evaluating the intensity and
3 persistence of symptoms. 20 C.F.R. §§416.929(c)(3)(iv), (v); *see also Greger v.*
4 *Barnhart*, 464 F.3d 968, 972-73 (9th Cir. 2006) (failure to report symptoms to
5 treatment providers undermines claimant's credibility). Here, there is substantial
6 evidence to support the ALJ's conclusion there were minimal complaints regarding
7 headaches and most of the record relate to routine medical care and prenatal care.

8 Next, the ALJ noted that "physical exams are mostly within normal limits
9 including normal neurological exam findings." Tr. 25. The medical record
10 supports the ALJ's conclusion. *See, e.g.*, Tr. 312 (noting that in August 2010,
11 Plaintiff had extensive workup including CT, Xrays, and labs; all were normal); Tr.
12 330 (February 2010 neurological exam findings normal); Tr. 382 (Sept. 2011
13 neurological exam findings normal); Tr. 477-84 (Nov. 2012 neurological exam

14 _____
15 ¹¹ During nine visits, she made no complaints of headaches. *See* Tr. 419-426 (July
16 8, 2014 prenatal visit); Tr. 427-29 (July 1, 2014 prenatal visit); Tr. 437-43 (May
17 27, 2014 prenatal visit); Tr. 444-50 (May 14, 2014 prenatal visit); Tr. 451-57
18 (April 29, 2014 prenatal visit); Tr. 462-64 (April 24, 2014) (prenatal visit); Tr.
19 465-70 (April 1, 2014 prenatal visit); Tr. 471-72 (March 19, 2014) (prenatal visit);
20 Tr. 473-76 (Dec. 13, 2013 morning sickness).

1 findings normal). Plaintiff contends this conclusion is undermined by a CT scan
2 that revealed a frontal lobe calcification which could be specifically linked to her
3 headaches. ECF No. 16 at 14 (citing Tr. 498, 500). Plaintiff is correct that an
4 August CT scan report notes a “small calcification over the left frontal lobe,
5 possibly from an old infectious, inflammatory process.” Tr. 498. However, the
6 report concludes “no acute findings.” Tr. 498. Contrary to Plaintiff’s contention,
7 no medical provider indicated this calcification was related to her headaches. This
8 report does not undermine the ALJ’s conclusion regarding the medical record.

9 Next, the ALJ noted that at the time of the hearing, Plaintiff was not taking
10 medication due to her pregnancy and she dealt with her headaches as best as she
11 could. Tr. 25. As noted above, during her 2014 pregnancy, Plaintiff sought
12 medical treatment related to headaches on only two occasions. Evidence of
13 “conservative treatment” is sufficient to discount a claimant’s testimony regarding
14 the severity of an impairment. *Parra v. Astrue*, 481 F.3d 742, 751 (9th Cir. 2007)
15 (citing *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir. 1995) (treating ailments
16 with an over-the-counter pain medication is evidence of conservative treatment
17 sufficient to discount a claimant’s testimony regarding the severity of an
18 impairment). The ALJ reasonably concluded that this medical record did not
19 support the severity of the symptoms alleged. This was a clear and convincing
20 reason to discredit Plaintiff’s symptom complaints.

1 4. *Lack of Treatment*

2 Next, the ALJ found Plaintiff's lack of mental health treatment cast doubt on
3 her credibility regarding the severity of her symptoms. Tr. 25. Medical treatment
4 received to relieve pain or other symptoms is a relevant factor in evaluating pain
5 testimony. 20 C.F.R. § 416.929(c)(3)(iv), 416.929(c)(3)(v). The ALJ is permitted
6 to consider the claimant's lack of treatment in making a credibility determination.
7 *Burch*, 400 F.3d at 681. The ALJ noted that during an initial assessment for
8 mental health treatment in October 2012, Mr. Anderson noted that Plaintiff had last
9 had mental health treatment in May 2007. Tr. 25. The ALJ further noted that
10 Plaintiff had only two follow-up appointments, one in November 2012 and January
11 2013. Tr. 25.

12 Plaintiff contends the ALJ erred in this finding because Plaintiff "has been in
13 counseling for most of her life, sought help on numerous occasions, and was
14 medicated." ECF No. 18 at 8. Here, the medical record includes only four
15 instances of mental health treatment from 2010 to 2014, and only two of those are
16 from the relevant period, despite Plaintiff alleging disabling depression and
17 anxiety.

18 Plaintiff contends that it is a "questionable practice" for an ALJ to find a
19 person less credibly for not seeking mental health treatment. ECF No. 16 at 15.
20 Where the evidence suggests lack of mental health treatment is part of a claimant's

1 mental health condition, it may be inappropriate to consider a claimant's lack of
2 mental health treatment as evidence of a lack of credibility. *See Nguyen v. Chater*,
3 100 F.3d 1462, 1465 (9th Cir. 1996). However, when there is no evidence
4 suggesting a failure to seek treatment is attributable to a mental impairment rather
5 than personal preference, it is reasonable for the ALJ to conclude that the level or
6 frequency of treatment is inconsistent with the level of complaints. *Molina*, 674
7 F.3d at 1113-14. The ALJ noted that despite her testimony that she has severe
8 anxiety and depression symptoms, Plaintiff sought minimal treatment, two of
9 which resulted from situational crises, and only two of which occurred in the
10 relevant period. There is no evidence that Plaintiff's failure to seek treatment for
11 her mental health issues is attributable to an impairment. As such, this does not
12 negate the ALJ's consideration of Plaintiff's failure to seek treatment in making
13 the credibility determination.

14 5. Daily Activities

15 The ALJ found that Plaintiff's "activities of daily living are inconsistent with
16 the severity of her self-reported symptoms." Tr. 25. It is reasonable for an ALJ to
17 consider a claimant's activities which undermine claims of totally disabling pain in
18 making the credibility determination. *See Rollins*, 261 F.3d at 857.

19 Notwithstanding, it is well-established that a claimant need not "vegetate in a dark
20 room" in order to be deemed eligible for benefits. *Cooper v. Bowen*, 815 F.2d 557,

1 561 (9th Cir. 1987). However, if a claimant is able to spend a substantial part of
2 her day engaged in pursuits involving the performance of physical functions that
3 are transferable to a work setting, a specific finding as to this fact may be sufficient
4 to discredit an allegation of disabling excess pain. *Fair*, 885 F.2d at 603. “Even
5 where [Plaintiff’s daily] activities suggest some difficulty functioning, they may be
6 grounds for discrediting the claimant’s testimony to the extent that they contradict
7 claims of a totally debilitating impairment.” *Molina*, 674 F.3d at 1113.

8 Plaintiff testified that she lived alone with her four children, ages 12, 11, 6,
9 and 15 months (at the time of the hearing), one of which has special needs or
10 behavioral problems. Tr. 37-38, 40-41. Plaintiff indicated that her days were
11 primarily filled by caring for her children. Tr. 44. The ALJ noted that in a
12 November 2012 Adult Function Report, Plaintiff indicated that each day she would
13 get up, shower, take her kids to school, clean her home and fix a large meal for her
14 family. Tr. 271. She stated that she takes care of her children, including cooking,
15 doing laundry, and bathing. Tr. 271. She indicated she has no problem with
16 personal care and on a daily basis prepares a large meal that takes approximately
17 an hour. Tr. 272. She further indicated she has no limitations with household
18 chores, such as cleaning, laundry, household repairs, ironing, and mowing. Tr.
19 272. She reported that she leaves her house daily for appointments and to take her
20 children to school; she drives a car; is able to go out of the home alone, and

1 regularly goes out shopping for clothing, groceries, and personal needs. Tr. 273.
2 She reported she is able to pay bills, handle a savings account, count change, and
3 use a checkbook. Tr. 273. The evidence of Plaintiff's daily activities in this case
4 may be interpreted more favorably to the Plaintiff, however, such evidence is
5 susceptible to more than one rational interpretation, and therefore the ALJ's
6 conclusion must be upheld. *See Burch*, 400 F.3d at 679. Here, Plaintiff's daily
7 activities were reasonably considered by the ALJ to be inconsistent with the
8 Plaintiff's claims of disability headaches, depression, and anxiety.

9 **C. Severe Impairments**

10 Next, Plaintiff contends the ALJ improperly failed to find seizure disorder
11 was a medically determinable impairment at step two. ECF No. 16 at 17-20.

12 Plaintiff bears the burden to establish the existence of a severe impairment
13 or combination of impairments, which prevent her from performing substantial
14 gainful activity, and that the impairment or combination of impairments lasted for
15 at least twelve continuous months. 20 C.F.R. §§ 416.920(a)(4)(ii), 416.920(c),
16 416.909; *Edlund*, 253 F.3d at 1159-1160.

17 A physical or mental impairment is one that "results from anatomical,
18 physiological, or psychological abnormalities which are demonstrable by
19 medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. §§
20 423(d)(3), 1382c(a)(3)(D). An impairment must be established by medical

1 evidence consisting of signs, symptoms, and laboratory findings, and “under no
2 circumstances may the existence of an impairment be established on the basis of
3 symptoms alone.” *Ukolov v. Barnhart*, 420 F.3d 1002, 1005 (9th Cir. 2005) (citing
4 SSR 96–4p, 1996 WL 374187 (July 2, 1996)) (defining “symptoms” as an
5 “individual’s own perception or description of the impact of” the impairment).

6 The fact that a medically determinable condition exists does not
7 automatically mean the symptoms are “severe” or “disabling” as defined by the
8 Social Security regulations. *See, e.g., Edlund*, 253 F.3d at 1159-60; *Fair v. Bowen*,
9 885 F.2d 597, 603 (9th Cir. 1989); *Key v. Heckler*, 754 F.2d 1545, 1549-50 (9th
10 Cir. 1985). An impairment, to be considered severe, must significantly limit an
11 individual’s ability to perform basic work activities. 20 C.F.R. § 416.920(c);
12 *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). An impairment is not
13 severe if it does not significantly limit a claimant’s physical or mental ability to do
14 basic work activities. 20 C.F.R. §§ 404.1521(a), 416.921(a).¹² An impairment
15 does not limit an ability to do basic work activities where it “would have no more
16
17

18 ¹² The Supreme Court upheld the validity of the Commissioner’s severity
19 regulation, as clarified in S.S.R. 85-28, in *Bowen v. Yuckert*, 482 U.S. 137, 153-54
20 (1987).

1 than a minimal effect on an individual's ability to work." *Yuckert v. Bowen*, 841
2 F.2d 303, 306 (9th Cir. 1988).

3 Basic work activities include walking, standing, sitting, lifting, pushing,
4 pulling, reaching, carrying, or handling; seeing, hearing, and speaking;
5 understanding, carrying out and remembering simple instructions; responding
6 appropriately to supervision, coworkers and usual work situations; and dealing
7 with changes in a routine work setting. 20 C.F.R. §§ 404.1521(b), 416.1521(b);
8 S.S.R. 85-28.

9 Here, the ALJ found that Plaintiff has the following severe impairments:
10 migraine headaches and affective disorder. Tr. 21. The ALJ noted that Plaintiff
11 "has reported she had seizures due to headaches." Tr. 21. However, the ALJ
12 found "there is no objective medical evidence to support a seizure disorder," and
13 further concluded that Plaintiff "has no medically determinable seizure
14 impairment" and alternatively, even if established, the ALJ found that it is non-
15 severe. Tr. 21.

16 The ALJ did not err in determining seizure disorder was not medically
17 determinable. Although Plaintiff has reported a history of seizures, such
18 complaints were not born out in her treatment records. No acceptable medical
19 source diagnosed seizure disorder. In support of her argument, Plaintiff cites to
20 certain treatment records, however, those records reflect Plaintiff reported seizures;

1 no acceptable medical source diagnosed a seizure disorder. *See* ECF No. 16 at 17
2 (citing Tr. 379 (September 2011 treatment note stating “Pt states she gets seizures
3 due to her headaches”); Tr. 296 (March 2010 treatment note stating that current
4 medication is “Gabapentin 3 mg a day,” no mention of seizures); Tr. 394 (mental
5 health progress note stating Plaintiff reported “her pregnancy is considered high
6 risk due to her seizures”)).¹³ An impairment cannot be established by Plaintiff’s
7 symptom complaints alone. *Ukolov*, 420 F.3d at 1005.

8 Plaintiff contends that a CT scan showing “a small calcification” on her left
9 frontal lobe supports the impairment of seizure disorder. ECF No. 16 at 17-18
10 (citing Tr. 498 (2010 CT scan noting “[s]mall calcification over the left frontal
11 lobe, possibly from an old infectious, inflammatory process,” but noting that the
12 impression was “no acute findings”)). Such observation, however, is not a
13 diagnosis by an acceptable medical source that she has seizure disorder. *See*
14 *Ukolov*, 420 F.3d at 1006 (9th Cir. 2005). No doctor or acceptable medical source
15 indicated the calcification was in any way related to seizures, nor diagnosed
16 seizure disorder.

17 _____
18 ¹³ Significantly, the Court notes that Plaintiff’s 2013-2014 prenatal treatment
19 records for her most recent pregnancy made no notation of Plaintiff complaining of
20 any seizure activity. *See, e.g.*, Tr. 419-76.

Alternatively, the ALJ concluded that Plaintiff's seizures, if an impairment, were not severe. Plaintiff has identified no evidence in the record indicating that Plaintiff's seizures impacted her ability to work.

Furthermore, even if the ALJ should have determined that seizure disorder is a severe impairment, any error would be harmless because the step was resolved in Plaintiff's favor. *See Stout v. Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006); *Burch*, 400 F.3d at 682. Plaintiff makes no showing the condition mentioned creates limitations not already accounted for in the RFC and otherwise fails to develop the argument. *See Carmickle*, 533 F.3d at 1161 n.2 (determining issue not argued with specificity may not be considered by the Court). Thus, the ALJ's step two finding is legally sufficient.

CONCLUSION

After review, the Court finds that the ALJ's decision is supported by substantial evidence and free of harmful legal error.

IT IS ORDERED:

1. Plaintiff's motion for summary judgment (ECF No. 16) is **DENIED**.
2. Defendant's motion for summary judgment (ECF No. 17) is **GRANTED**.

The District Court Executive is directed to file this Order, enter **JUDGMENT FOR THE DEFENDANT**, provide copies to counsel, and **CLOSE THE FILE**.

1 DATED August 8, 2017.

2 s/Mary K. Dimke

3 MARY K. DIMKE

4 UNITED STATES MAGISTRATE JUDGE